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Kennedy v. Sheriff of East Baton Rouge: A Hollow Victory for Louisiana Defamation Plaintiffs?

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TABLE OF CONTENTS

I. INTRODUCTION

"What is said of a man is nothing. The point is who says it."[1]

Oscar Wilde may not have had defamation in mind when he penned those words, but their resounding message in the defamation context is fitting: The other "W" words—who, where, when, and why—are sometimes more important than the "what" in this complex area of tort law.[2] A survey of the past fifty years of jurisprudence in the United States shows a great fluctuation in defamation law. This fluctuation is demonstrated by the dramatic shift from the plaintiff-friendly era of strict liability under common law to the constitutional requirements placed on plaintiffs by the actual malice standard.[3] Since the United States Supreme Court interjected its authority into defamation law in the 1960's, the states are now left the task of cleaning up the confusion created by the high court. Much of the states' difficulty stems from attempts to classify different types of plaintiffs and defendants, set different fault standards, and fill in gaps left by the Supreme Court's jurisprudence.[4]

Gaps in Louisiana defamation law became the central issue when Jack in the Box[5] petitioned the Louisiana Supreme Court for

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1. Oscar Wilde, *Letter to Lord Alfred Douglas*, *in* ENOTES.COM, THE COLUMBIA WORLD OF QUOTATIONS (Robert Andrews et al. eds., 2006), http://history.enotes.com/famous-quotes/what-is-said-of-a-man-is-nothing-the-point-is-who (last visited Aug. 28, 2007).

2. To help the reader digest the mass of information needed for a defamation analysis, please refer to the appendix for definitions and categorical information that will be helpful throughout the note.

3. The "actual malice" standard, which is discussed in depth *infra* Part II.B, requires that a plaintiff prove a defendant knows a defamatory statement is false or has a reckless disregard for the truth of the statement. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

4. Historically, there are three important classifications that impact the way in which a defamation action is handled: (1) whether the plaintiff is classified as private or public; (2) whether the defendant is classified as media or non-media; and (3) whether the matter in question is of private or public concern. *See generally* FRANK L. MARAIST & THOMAS C. GALLIGAN, JR., LOUISIANA TORT LAW § 19 (2d ed. 2004).

5. Jack in the Box, Inc., was one of two original defendants in the case, Kennedy v. Sheriff of E. Baton Rouge, 899 So. 2d 682 (La. App. 1st Cir. 2005),

certiorari to address a defamation claim against it arising from an incident at its Baton Rouge restaurant in December of 2001. Alfred Kennedy, III entered the drive-through lane of a Jack in the Box restaurant to make an order.[6] When he tendered a one hundred dollar bill for payment, a restaurant employee suspected it was counterfeit and, after conducting a naked eye examination, notified law enforcement officers.[7] Thereafter, Kennedy was handcuffed and detained at a sheriff's substation while the authenticity of the bill was investigated.[8] The police later found the bill to be legitimate and released Kennedy, who then filed suit against the restaurant and sheriff's office seeking damages.[9]

Both defendants filed motions for summary judgment in response to Kennedy's complaint, and the trial court granted them both, dismissing the claims.[10] With respect to Kennedy's defamation claim, the court found no sufficient showing of malice to support such a claim.[11] However, the Louisiana First Circuit Court of Appeal concluded the defendants, in accusing Kennedy of the crime without any training to detect counterfeit currency, "failed to show that they acted reasonably or without reckless disregard for Mr. Kennedy's rights."[12] Thus, the first circuit vacated the district court's order and remanded the matter for further proceedings.[13]

The Louisiana Supreme Court granted certiorari to address the Kennedy defamation claim: a claim that pits a *private* plaintiff against a *non-media* defendant in a matter of *public* concern.[14]

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writ granted, 920 So. 2d 217 (La. 2006), and was the sole defendant remaining when the case reached the Louisiana Supreme Court, Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669 (La. 2006).

6. *Kennedy*, 935 So. 2d at 673.

7. *Id.*

8. *Id.*

9. *Kennedy*, 899 So. 2d 682.

10. Jack in the Box filed an exception of no cause of action, which was denied, and an alternative motion for summary judgment. *Id.* at 684.

11. *See generally id.*

12. *Id.* at 689.

13. *Id.*

14. *Kennedy*, 920 So. 2d 217. For more information about the significance of the italicized terms, see the tables in the appendix, *infra*.

More specifically, the court considered whether the Jack in the Box employee enjoyed a qualified privilege when reporting the suspected counterfeit currency to the police, and if so, what evidence would be sufficient for the plaintiff to prove abuse of that privilege.

Kennedy v. Sheriff of East Baton Rouge[15] represents the Louisiana Supreme Court's most recent effort to answer the lingering uncertainties in Louisiana's treatment of defamation law. Three significant developments stand out from the decision: (1) the end of Louisiana's strict liability defamation regime due to broad constitutional protections afforded to *all* defendants, with the possibility of a small window left for strict liability only in matters of private concern;[16] (2) the adoption of a uniform negligence standard for all private defamation plaintiffs; and (3) a heightened burden on plaintiffs to prove abuse of a qualified privilege, a burden that will influence many defamation cases and revive remnants of the *New York Times*[17] actual malice standard for the foreseeable future.

This note seeks to guide the reader through the historical development of defamation law on the national and state level, critically analyze significant developments of the *Kennedy* decision, and predict its impact on future defamation litigation in Louisiana. Part II examines the common law-influenced history of defamation in Louisiana under Louisiana Civil Code article 2315, as well as constitutional developments by the U.S. Supreme Court. Part II ends with a short discussion of the uncertainties remaining in Louisiana that the *Kennedy* court sought to address. Part III critically analyzes the three significant areas of the decision: (1) constitutional protections afforded to all defendants; (2) the adoption of a uniform negligence standard for all private plaintiffs; and (3) the affirmation of a higher burden of proof for plaintiffs to prove abuse of a qualified privilege. Finally, the conclusion

15. 935 So. 2d 669 (La. 2006).

16. In strict liability defamation, if the words are considered defamatory, the elements of fault, falsity, and damages are presumed in favor of the plaintiff, which places the burden on the defendant. *See* MARAIST & GALLIGAN, *supra* note 4, § 19.01.

17. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (discussed in detail *infra* Part II.B).

scrutinizes the *Kennedy* decision and predicts its future impact on defamation law in Louisiana.

II. BACKGROUND

The depth of the *Kennedy* decision can not be fully appreciated by a cursory reading because it represents a culmination of years of defamation law. Louisiana defamation law has been a fifty-year consolidation of many issues: a base of common law tradition, blurred plaintiff and defendant classifications and standards of liability, and even a dash of constitutional law—compliments of the U.S. Supreme Court. The *Kennedy* decision is the Louisiana Supreme Court's attempt at a convergence of all of those ingredients—a convergence in which the historical development of defamation law plays an important role.

A. Common Law Defamation in Louisiana

Defamation is a tort that involves the invasion of a person's interest in his or her reputation or name in the community.[18] The Louisiana Supreme Court thoroughly addressed this tort in the 2004 decision *Costello v. Hardy*.[19] *Costello* set forth four elements necessary for a successful defamation claim: (1) a false and defamatory statement concerning another;[20] (2) an unprivileged publication to a third party; (3) fault (negligence or greater) on the part of the publisher;[21] and (4) resulting injury.[22]

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18. Trentecosta v. Beck, 703 So. 2d 552, 559 (La. 1997) (citing Sassone v. Elder, 626 So. 2d 345, 350 (La. 1993) (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111 (5th ed. 1984))).

19. 864 So. 2d 129 (La. 2004).

20. "Defamatory words are, by definition, words which tend to harm the reputation of another so as to lower the person in the estimation of the community, to deter others from associating or dealing with the person, or otherwise expose a person to contempt or ridicule." *Costello*, 864 So. 2d at 140 (citing RESTATEMENT (SECOND) OF TORTS § 559 cmt. e (1977)). The question of whether words are defamatory is a legal question for the court. *Sassone*, 636 So. 2d at 350.

21. Although the fault requirement now requires negligence or greater in almost all cases, the traditional common law standard was that of malice, either actual or implied. *See* MARAIST & GALLIGAN, *supra* note 4, § 19.02.

22. *Trentecosta*, 703 So. 2d at 559 (quoting RESTATEMENT (SECOND) OF TORTS § 558 (1977)).

In Louisiana, defamatory words are divided into two categories: (1) those that are *defamatory per se* because they either accuse another of criminal conduct or by their nature tend to harm the reputation of another; and (2) those that are susceptible of defamatory meaning given the circumstances.[23] Traditionally, when a plaintiff proves publication of *defamatory per se* words, the elements of falsity and malice (fault) are presumed, but the presumption can be rebutted by the defendant.[24] However, the plaintiff must prove all the elements of defamation in cases where the words are merely susceptible of defamatory meaning, or where constitutional protections[25] are in place.[26]

A defendant may defeat a prima facie case by asserting one of the two most common defenses available: truth or privilege.[27] If the defendant proves that the alleged defamatory statement is true, then recovery is precluded because the tort's first element, a *false* statement, is not met. The second defense, privilege, is deeply rooted in the common law. It was originally developed as a remedy to the harsh system of strict liability, and the defense reflects the state's public policy of promoting free communication in certain instances.[28]

There are two types of privileges: absolute and qualified. Absolute privileges are restricted to limited circumstances, such as

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23. *Costello*, 864 So. 2d at 140. In this case, the plaintiff alleged in a petition that the defendant's work as her attorney fell below the professional standard of care, to which the attorney filed a reconventional demand for defamation. *Id.* The Louisiana Supreme Court found the words to be defamatory under those circumstances because they "tend to diminish [the attorney's] reputation with respect to his profession." *Id.* at 141.

24. *Id.* (citing Kosmitis v. Bailey, 685 So. 2d 1177, 1180 (La. App. 2d Cir. 1996)). The "injury" element may also be presumed. In cases of words that are defamatory per se, the defamation action essentially becomes a strict liability tort. *See* MARAIST & GALLIGAN, *supra* note 4, § 19.01.

25. *See infra* Part II.B for a detailed discussion of the constitutional protections.

26. *Costello*, 864 So. 2d at 140–41.

27. *Id.* at 141.

28. Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669, 681 (La. 2006). *See also* Richard L. Barnes, *The Constitutional Fault Test of* Gertz v. Robert Welch, Inc. *and the Continued Vitality of the Common Law Privileges in the Law of Defamation*, 20 ARIZ. L. REV. 799, 804–06 (1978).

certain communications during judicial proceedings.[29] Qualified privileges[30] are not restricted to specific circumstances but depend upon whether there is a justification to protect the interests of the communicator or the public.[31] Louisiana courts recognize various qualified privileges dealing with both private and public interests. For instance, the "fair comment on public affairs" privilege often protects police officers giving interviews about arrests.[32] In addition, private interests are protected by privileges in some circumstances, such as alleged defamatory remarks among an ecclesiastical board.[33] Regardless of whether it is a matter of public or private concern, the focus of the inquiries into the existence of a privilege is on the good faith of the communicator, whether the communicator has an interest or duty with regard to the communication, and whether it is disclosed to a person with a corresponding interest or duty.[34]

A qualified privilege is ultimately the court's recognition of the need to balance the individual's right of reputation against competing interests of either a third party or the public. It is "a defense based on the weighing of (1) the protection of the interest of the offended person against the harm done to his or her reputation, and (2) the protection of the interest of the public in receiving the information if it were true."[35] Equally important to the application of a qualified privilege is the standard of proof required to show *abuse* of a privilege—an issue discussed in depth *infra* Part III.C.

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29. *Kennedy*, 682–83.

30. The words "qualified" and "conditional" are synonymous with regard to privileges. For purposes of uniformity, "qualified" will be used throughout this note.

31. *Kennedy*, 935 So. 2d at 682.

32. Trentecosta v. Beck, 703 So. 2d 552, 563–64 (La. 1997) (recognizing fair comment privilege but declining to extend qualified privilege to defamatory statements a police officer made during a newspaper interview where the officer had no reason to believe the statements to be true).

33. Joiner v. Weeks, 383 So. 2d 101, 102 n.3 (La. App. 3d Cir. 1980), *cited in* MARAIST & GALLIGAN, *supra* note 4, § 19.02, at n.22. *See generally* Barnes, *supra* note 28.

34. *Kennedy*, 935 So. 2d at 682 (citing Toomer v. Breaux, 146 So. 2d 723, 725 (La. App. 3d Cir. 1962)).

35. *Trentecosta*, 703 So. 2d at 560.

B. Constitutional Requirements

After years of common law dictating the course of defamation as a strict liability tort, the U.S. Supreme Court left an undeniable impression on the tort with its decision in *New York Times Co. v. Sullivan*,[36] which inserted First Amendment concerns into actions brought by public officials. This pronouncement shaped the course of defamation law for nearly the next half century.[37] The decision emphasized a democracy's need for free, robust speech in public affairs. It "not only imposed the requirement of a high degree of fault in defamation actions brought by public officials, but also shifted the burden of proof of fault to the public official."[38]

More specifically, the free speech protections the high court afforded in *New York Times* prevents public officials from recovering for defamation without a showing that the statement was made with "actual malice," or in other words, with knowledge that the statement is false or with reckless disregard for its truth.[39] The heightened standard established by the Court makes it more difficult for plaintiffs to establish a prima facie case of defamation. The new standard also shifts the burden of proof to the plaintiff, a

36. 376 U.S. 254 (1964) (in which a local police commissioner brought a libel action against four clergymen and the *New York Times* newspaper stemming from a full page advertisement that contained inaccuracies about police conduct).

37. While each state was previously free to set its own fault standard, the *New York Times* decision represented the first time the U.S. Supreme Court imposed a requirement of fault, although it was limited to a public official plaintiff and a media defendant. The decision led one prominent legal scholar to dub it "the greatest victory won by defendants in the modern history of the law of torts." PROSSER ON TORTS § 118, at 819 (4th ed. 1971), *quoted in* ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 1–6, n.22 (3d ed. 2001). *See also* Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 U. CHI. L. REV. 782 (1986); Rodney A. Smolla, *Dun and Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519 (1987).

38. *Trentecosta*, 703 So. 2d at 560.

39. *New York Times*, 376 U.S. at 279–80. For discussion of the difference between the use of the word "malice" in common law and in *New York Times*, see Patrick J. McNulty, *The Law of Defamation: A Primer for the Iowa Practitioner*, 44 DRAKE L. REV. 639 (1996).

drastic change from the strict liability presumptions previously provided to plaintiffs.[40] The Supreme Court, in subsequent opinions, extended the actual malice standard to public figures[41] and, in the furthest extension by the high court, to all matters of public concern regardless of the classification of the plaintiff.[42]

Only a few years later, the Supreme Court changed course by adopting a more hands-off approach to defamation in *Gertz v. Robert Welch, Inc.*[43] The Court recognized the states' interest in protecting the reputations of their citizens by rejecting the previous "matter of public concern" approach.[44] Further, the Court distinguished between public and private plaintiffs and determined that private plaintiffs were entitled to more extensive protection.[45] The Court in *Gertz* established the individual states' freedom to set their own standards of fault, so long as they do not impose strict

40. For example, under the old regime, a newspaper publisher defendant in a defamation lawsuit brought by a public figure would have to rebut the presumption that its story was malicious by introducing evidence that proved it was not—a burden that caused some self-censorship in the media. In contrast, after the *New York Times* decision, a publisher could print any story about a public figure as long as it was not so outrageous as to be considered "reckless," such as a completely fabricated story. *See* Joan E. Schaffner, *Protection of Reputation Versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 433, 440–45 (1990).

41. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163–64 (1967) (defining a public figure as one involved in the resolution of important questions or who shapes areas of concern in society by virtue of his fame).

42. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971) (later repudiated by the Supreme Court, *see* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), and widely criticized). For discussion of the shortcomings of the *Rosenbloom* opinion, see Schaffner, *supra* note 40, at 445–46.

43. 418 U.S. 323 (in which a *private* individual brought an action against a *media* defendant for publishing a magazine article describing the plaintiff as a "communist-fronter" and commenting on his participation in "Marxist" activities).

44. *See* Schaffner, *supra* note 40, at 446. That approach in *Rosenbloom* relied on the matter of concern to set the fault standard, rather than the status of the plaintiff.

45. *Id.* at 446–47; *Gertz*, 418 U.S. at 344–46 (finding private plaintiffs more worthy of protection because they (1) have less opportunity to rebut a defamatory statement and are more vulnerable to injury than public plaintiffs, and (2) do not voluntarily assume the risk of injury by placing themselves in the public eye).

liability.[46] The plurality opinion never explicitly stated the level of fault necessary to satisfy the constitutional requirements, but the language suggests that mere negligence will suffice.[47] The Supreme Court later built on its decision in *Gertz* by holding that the First Amendment requires a plaintiff to prove falsity in addition to the *Gertz* fault requirement.[48]

C. Limited Holdings and Lingering Uncertainties

As a result of the U.S. Supreme Court's defamation jurisprudence "see-sawing" between plaintiffs' and defendants' interests, numerous questions have been left unanswered—a testament to the increasing complexity and breadth of defamation law. These unanswered questions leave states like Louisiana the task of making sense out of a strange convergence of longstanding common law, emerging constitutional law, and competing interests of the individual and public.

First, the Supreme Court's holdings make it uncertain as to *whom* the constitutional protections apply, and whether there is still a window for strict liability defamation in matters of private concern. Because the *Gertz* decision is explicitly limited to media defendants, some courts have refused to extend the constitutional protections to non-media defendants, leaving an open window to strict liability in many cases.[49] U.S. Supreme Court decisions after

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46. *Gertz*, 418 U.S. at 346–47. Reflecting on the *Gertz* decision and subsequent resurgence of states in shaping defamation, McNulty writes, "The states, therefore, have the responsibility of balancing the state interest in compensating injury to the reputation of private individuals with the constitutional interest of free speech and press." McNulty, *supra* note 39, at 695.

47. *See* DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE § 6.1, at 2 (1993).

48. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986). It is important to note that the *Gertz* line of cases is limited in scope to *private* plaintiffs against *media* defendants in matters of *public* concern.

49. *See* McNulty, *supra* note 39, at 695 n.574 (citing, e.g., Vinson v. Linn-Mar Cmty. Sch. Dist., 360 N.W.2d 108, 118 (Iowa 1984) ("holding that 'where only a private plaintiff and non-media defendant are involved, the common law standard does not threaten the free and robust debate of public issues . . . .'"); Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 461 A.2d 414, 417–18 (Vt. 1983) ("holding that the media protections provided in *Gertz* were not applicable

Gertz raise the possibility of limited defamation cases in which there would be no constitutional bar to a return to strict liability.[50] In *Kennedy*, the Louisiana Supreme Court addresses the possible distinction between media and non-media defendants and, to a certain extent, the possibility of strict liability defamation.[51]

Second, the *Gertz* line of decisions left each individual state to determine the standard of fault applicable to private plaintiffs. These decisions contrast the constitutionally mandated "actual malice" standard for public plaintiffs announced in *New York Times*.[52] For the past thirty-two years, states have utilized their freedom to adopt different fault standards such as simple negligence, gross negligence, and the stringent actual malice standard.[53] The *Kennedy* decision is Louisiana's deepest foray into the nationwide debate regarding private plaintiff fault standards.

Finally, the most intriguing uncertainty the *Kennedy* decision addresses is the possible continued adoption of a higher abuse standard to defeat a qualified privilege. Since the *Gertz* decision, the long-term validity of common law privileges is questionable. The inherent conflict between the constitutional fault required (negligence or greater) to establish a prima facie case and the traditional grounds to prove abuse of a privilege (essentially negligence as to the truth) brings into question the continuing

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to non-media defamation cases")). On the other hand, McNulty argues that distinguishing between media and non-media defendants would be illogical:

> It makes no constitutional sense to rest the *Gertz* damage rule on the nature of the speech—public versus private—and base the *Gertz* rule of no liability without fault on the status of the defendant—media versus non-media . . . freedom of speech is just as much the right of the lonely pamphleteer as it is the metropolitan publisher.

See McNulty, *supra* note 39, at 696 n.574.

50. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985) (holding that in a case with a private plaintiff against a non-media defendant in a matter of purely private concern, the First Amendment does not necessarily force a change to traditional common law defamation, such as presumed damages).

51. Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669, 675–79 (La. 2006).

52. *Id.* at 679.

53. *See generally* ELDER, *supra* note 47, § 6.2, at 4–11.

validity of common law privileges.[54] While some scholars have suggested that common law privileges should be eliminated in favor of a uniform negligence standard,[55] others have advocated a higher abuse standard to defeat a conditional privilege.[56] In a thorough discussion, the Louisiana Supreme Court took its stand on the complex issue by affirming the heightened standard for abuse of a qualified privilege. The court's controversial position on this issue is perhaps the most important among many developments that will affect practitioners on both sides of the bar.

III. ANALYSIS

A. Constitutional Protections: The Non-Media Defendant and the End of Strict Liability?[57]

Of the many significant developments in *Kennedy*, the court's broad holding mandating constitutional protections regardless of the defendant's classification fills a gap left by previous court decisions. Because the U.S. Supreme Court's holdings in the *Gertz* and *Hepps* decisions are limited to media defendants, the Louisiana Supreme Court in *Kennedy* addresses "whether the principles enunciated by the Supreme Court . . . should logically extend to include non-media defendants."[58] In other words, the court considered whether the First Amendment protections supersede common law presumptions of fault and falsity.

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54. *Kennedy*, 935 So. 2d at 684.

55. *See generally* Barnes, *supra* note 28.

56. *See* RESTATEMENT (SECOND) OF TORTS, Special Note on Conditional Privileges and the Constitutional Requirement of Fault (1977) [hereinafter RESTATEMENT, Special Note].

57. When referring to defendants, the term "constitutional protection" means that defendants are protected from being found guilty of defamation based on *presumed* fault and falsity. When referring to plaintiffs, that same concept is expressed by the term "constitutional requirement," since plaintiffs would be required to prove elements that could formerly be presumed.

58. *Kennedy*, 935 So. 2d at 677. The *Gertz* and *Hepps* decisions established that, in defamation cases with media defendants, the First Amendment requirements supersede common law presumptions of fault, damages, and injury in matters of public concern—meaning the burden of proof is on the plaintiff. *Id.* at 676.

The Louisiana Supreme Court declined to distinguish media and non-media defendants. Instead, the court granted broad constitutional protections to defendants regardless of their classification: "We find that a private individual's right to free speech is no less valuable than that of a publisher . . . ."[59] In support of its holding, the *Kennedy* court cited the *New York Times* decision, which protected free speech and pointed out that the constitutional protections applied to "critics of . . . official conduct."[60] This expansive description is broad enough to encompass both classes of defendants. Similarly, the court relied on *Gertz,* emphasizing that the constitutional protections are imposed to protect First Amendment freedoms.[61] The court in *Kennedy* promptly pointed out that constitutional protections are not only for the freedom of the press, but also for the freedom of *speech.*[62]

1. Reasons for Adoption of Broad Constitutional Protections

After establishing the underlying purpose of the constitutional protections—to safeguard First Amendment rights—the court noted that Louisiana's Constitution contains a similar provision with the same purpose.[63] The *Kennedy* court also drew support from a Louisiana appellate case that applied the constitutional protections to a non-media defendant.[64] Further, the court mentioned other states that have adopted similar holdings by

59. *Id.* at 678 ("[W]e conclude as a matter of state law that the *Gertz* and *Philadelphia Newspapers* holdings should apply to media and non-media defendants alike.").

60. *Id.* at 677 (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 256 (1964)).

61. *Id.* at 678.

62. *Id.*

63. *Id.* (citing LA. CONST. art. I, § 7).

64. *Id.* (citing Wattigny v. Lambert, 408 So. 2d 1126, 1130–31 (La. App. 3d Cir. 1984)). In *Wattigny*, a sheriff sued an attorney for defamatory statements stemming from a wrongful arrest petition in a separate court pleading. The court applied the actual malice standard because it contended the *New York Times* decision sought to protect freedom of *speech* in addition to freedom of the press. *Wattigny*, 408 So. 2d 1126.

applying a similar rationale.[65] In one of the first post-*Gertz* decisions to extend the constitutional protections, *Jacron Sales Co. v. Sindorf*, Maryland's high court extended those protections to a former employer who made defamatory statements to a prospective employer about the plaintiff's work conduct.[66] The case presents a compelling argument for broad constitutional protections, and the *Jacron* decision has been cited by many courts across the country including the Louisiana Supreme Court.[67]

In addition to its reliance on jurisprudence from other states, the *Kennedy* court quoted a lengthy passage from the Restatement's comments explaining in part why the *Gertz* principles should apply to all defendants:

> [T]he protection of the First Amendment extends to freedom of speech as well as to freedom of the press, and the interests that must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.[68]

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65. *Kennedy*, 935 So. 2d at 678 (citing Jacron Sales Co. v. Sindorf, 350 A.2d 688 (Md. 1976); Bryan v. Brown, 339 So. 2d 577 (Ala. 1976); Ryder Truck Rentals, Inc. v. Latham, 593 S.W.2d 334 (Tex. App. El Paso 1979)).

66. 350 A.2d at 688. Many of the reasons for the broad constitutional protections present in *Kennedy* were first argued by the Maryland court in *Jacron*: the "instructive" influence of the *New York Times* decision, reservations about elevating the media above private defendants for all fault standards and a desire for consistency in defamation law. *See generally id.*

67. *See, e.g.*, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 753 (1985); *Kennedy*, 935 So. 2d at 678; Gazette, Inc. v. Harris, 325 S.E.2d 713, 726–27 (Va. 1985); Denny v. Mertz, 318 N.W.2d 141, 148–49 (Wis. 1982); Stuempges v. Parke, Davis & Co., 297 N.W.2d 252, 257–58 (Minn. 1980); Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1363 (Or. 1977); Mashburn v. Collin, 355 So.2d 879, 892 (La. 1977); Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216, 1221–22 (Ariz. 1977).

68. RESTATEMENT (SECOND) OF TORTS § 580B cmt. e (1977).

The court seemingly foreclosed any possibility of strict liability defamation in Louisiana by mandating constitutional requirements for private plaintiffs against all defendants, without any explicit limitation to matters of *public* concern.[69] Even so, the court's holding fails to explicitly address a critical question: Do the constitutional requirements also apply to a private plaintiff against a non-media defendant in a matter of purely *private* concern?

2. Reasons Against Adoption of Broad Constitutional Protections

The court's broad language in the holding[70] may be interpreted so as to encompass private speech as well; however, such an interpretation raises numerous problems. First, the court's reliance on *New York Times* and *Gertz* would be inapplicable with regard to private speech because it does not raise the same constitutional concerns as public speech; the state does not have the heightened level of interest in private speech that it often does in public speech.[71]

Additionally, the U.S. Supreme Court held in the *Dun & Bradstreet v. Greenmoss Builders* plurality opinion that the *Gertz* constitutional requirements do not apply to a private plaintiff against a non-media defendant in a matter of purely private concern.[72] Legal scholar David A. Elder contends that the *Dun &*

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69. Because all defendants are provided with constitutional protections, the burden would be on the plaintiff to prove fault, damages, and injury—all of which could be presumed under traditional common law if the words were determined to be defamatory per se. *Kennedy*, 935 So. 2d at 678; Costello v. Hardy, 864 So. 2d 129 (La. 2004).

70. *See supra* note 59 and accompanying text.

71. *Kennedy*, 935 So. 2d at 676 n.5 (discussing the holding of *Dun & Bradstreet*, 472 U.S. 749, discussed *supra* note 50). *See generally* Cangelosi v. Schweggman Bros. Giant Supermarkets, 390 So. 2d 196 (La. 1980) (applying pre-*New York Times* presumed fault in defamation case where a cashier accused her grocery store management of defaming her in relation to missing money from her register—speech that is of purely private concern), *cited in* MARAIST & GALLIGAN, *supra* note 4, § 19.02, at n.62.

72. 472 U.S. 749 (White, J., concurring) (suggesting that *Gertz* is not only inapplicable to damages, but also that "some kind of fault on the part of the defendant is also inapplicable in cases such as this"), *cited in* ELDER, *supra* note 47, § 6.11, at 49.

Bradstreet holding rejects numerous state court decisions and Restatement comments, most of which predicted the *Gertz* requirements would cover all defamation suits.[73] Instead, it appears that *Dun & Bradstreet* has revived the public versus private concern debate that was central to the *Rosenbloom v. Metromedia, Inc.*[74] decision many years earlier.[75]

Finally, the plain language of the holding would overrule *Costello v. Hardy*, the 2004 Louisiana Supreme Court ruling allowing for strict liability defamation when speech is considered defamatory per se and there is a private plaintiff, non-media defendant, and a matter of private concern.[76] It is possible that the *Kennedy* decision eliminates all strict liability from Louisiana defamation. However, it is more likely that the court's acknowledgement of the *Dun & Bradstreet* decision and the application of its principles in *Costello* will be recognized by lower courts despite the overly inclusive language of the holding.[77] This interpretation allows courts to lower the burden for private plaintiffs against private defendants in matters of private concern—a balance that is similar to the public/private speech distinction made by the court later in the opinion and that aligns it with established jurisprudence.

B. Adoption of a Uniform Negligence Standard for Private Plaintiffs

While the court's extension of constitutional protections to all defendants in *Kennedy* requires *some* showing of fault by a plaintiff, exactly *what* standard of fault is required for a private

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73. ELDER, *supra* note 47, § 6.11, at 49–50.

74. 403 U.S. 29 (1971).

75. ELDER, *supra* note 47, § 6.11, at 49–50. *See also supra* notes 42, 44 and accompanying text. Rather than focusing on the status of the plaintiff as public or private, the *Rosenbloom* decision stated that constitutional protections should be extended to all matters of *public* concern regardless of the status of the parties. 403 U.S. 29.

76. Costello v. Hardy, 864 So. 2d 129 (La. 2004).

77. If that interpretation is adopted by lower courts, strict liability defamation would likely be possible only in cases where there is: (1) a private plaintiff, (2) a non-media defendant, (3) a matter of purely private concern, and (4) speech that is considered defamatory per se according to *Costello*.

plaintiff is a source of confusion in the wake of *Gertz*.[78] The Louisiana Supreme Court's decision in *Trentecosta v. Beck* expressly declined to answer the question regarding the standard of fault applicable to a private plaintiff against a non-media defendant in a matter of public concern.[79]

The *Kennedy* court adopted the Restatement negligence standard for all private plaintiffs to respond to *Gertz* and clarify Louisiana defamation law.[80] The court adopted the lower negligence standard and pointed out many distinctions between public and private plaintiffs[81] despite the pleas of current and former justices for a higher standard of fault.[82]

1. Reliance on Gertz *Principles*

The court relied heavily on the principles of the three decade old *Gertz* decision to elaborate on the distinctions between public and private plaintiffs. First, the court pointed out that the considerations prompting the U.S. Supreme Court to adopt the *New York Times* actual malice standard for public figures did not apply with equal force to private individuals; this distinction was at

78. *See* Neuberger, Coerver, & Goins v. Times Picayune Pub. Co., 597 So. 2d 1179 (La. App. 1st Cir. 1992), *cited in* ELDER, *supra* note 47, § 6.2, at 6 n.44.

79. Janine M. Vernaci, Trentecosta v. Beck*: Louisiana Law Enforcement Officers Now Enjoy a Qualified Privilege in Defamation Suits*, 44 LOY. L. REV. 339, 350 (1998) (discussing the court's deferral of the liability issue and questionable application of the *New York Times* actual malice standard without further explanation).

80. Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669, 681 (La. 2006). The Restatement negligence standard is discussed in more detail below, and would be treated like any standard negligence analysis under Louisiana tort law. For a discussion of the basic concepts of negligence in a defamation action, see Michael A. Sarafin, *A Rationale for Reforming the Indiana Standard in Private Figure Defamation Suits*, 35 VAL. U. L. REV. 617, 638–45 (2001).

81. *Kennedy*, 935 So. 2d at 679–81. Those distinctions will be discussed in detail *infra* Part III.B.

82. *See* Trentecosta v. Beck, 703 So. 2d 552, 565 (La. 1997) (Johnson, J., dissenting); Romero v. Thomson Newspapers, Inc., 648 So. 2d 866, 871 (La. 1995) (Dennis, J., concurring) (contending that the constitutional protections first discussed in *Rosenbloom* should apply to any cases of public concern regardless of the plaintiff's status, inferring that the actual malice standard would apply even to private plaintiffs).

the heart of the *Gertz* decision.[83] Second, the court discussed an important difference between public and private plaintiffs; namely, there is less access to channels of effective communication to counteract false statements for private plaintiffs.[84] Although the strength of this argument may be waning with the advent of mass media, like twenty-four hour news and the Internet, it remains true in many ways.[85] For example, if a popular internet blogger were to post defamatory statements about a current political candidate on a website, there is a good chance the story could gain media attention, forcing the politician to respond in the limelight. On the other hand, if similar comments were posted about a local business person, the chances of a similar opportunity to respond are significantly less because of the economic realities of media coverage.[86]

Finally, the court echoed the sentiments of the *Gertz* decision by stating that private plaintiffs "are at once both more vulnerable to injury and more deserving of protection and recovery."[87] The "more deserving" designation for private plaintiffs stems from the *Gertz* rationale that public plaintiffs have voluntarily exposed themselves to an increased risk of injury.[88] However, legal scholar Joan Schaffner has criticized this justification and said it "assumes public [plaintiffs] have access to a form of self-help."[89] Even further, Schaffner asserts that public plaintiffs are arguably *more*

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83. *Kennedy*, 935 So. 2d at 681–83. The First Amendment right in reporting the activities of *public* plaintiffs is more substantial than private individuals because it is necessary for free discussion of government.

84. *Id.* at 679–80. For a discussion of examples regarding public/private plaintiffs and their interaction with the media, see Sarafin, *supra* note 80, 655–56.

85. Sarafin, *supra* note 80, at 655–56. For example, a public plaintiff, such as a politician, will be better prepared to address defamatory statements in the media because of his experience in the public arena and dealing with the press, especially when compared to a private plaintiff.

86. There are obviously factual situations in which a business person could also be considered a "public figure," but one does not need to stretch his imagination far to discover scenarios in which public plaintiffs have distinct advantages over private plaintiffs to counter defamatory statements.

87. *Kennedy*, 935 So. 2d at 679 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)).

88. *Id.*

89. Schaffner, *supra* note 40, at 464.

vulnerable to injury than private plaintiffs because public plaintiffs often depend on public endorsement for their livelihood.[90] Even considering valid criticisms, the court's recognition of the distinction between public and private plaintiffs is one of many reasons that justify the adoption of a negligence standard.

2. State Interest in Protection of Private Individual Reputation

The court used language in the Louisiana Constitution to justify a negligence standard in addition to its use of the *Gertz* decision.[91] The court focused on the explicit language in article I, section 7 that protects the reputations of private individuals because it states that people are "responsible for the abuse of that freedom [of speech]."[92] The *Kennedy* court, in similar fashion to many other states,[93] interpreted that language as an express concern for the reputation of private individuals; a concern warranting a lower burden on private plaintiffs in defamation actions.[94] The court's interpretation rightly acknowledges the state's interest in not only protecting free speech, but also protecting the reputations of private individuals.[95]

In addition to constitutional support, the court acknowledged that adoption of the negligence standard in this instance (private plaintiff/public concern) would simplify Louisiana defamation law, making the fault standard consistent insofar as private plaintiffs are concerned.[96] The court held in *Costello* that proving malice was "more akin to negligence with respect to the truth than to spite or

90. *Id.*

91. *Kennedy*, 935 So. 2d at 679–81.

92. *Id.* at 679–80 (quoting LA. CONST. art. I, § 7).

93. In Martin v. Griffin Television, Inc., 549 P.2d 85, 92 (Okl. 1976), the Supreme Court of Oklahoma adopted a negligence standard based in part on the same constitutional concerns: "Expressly in its constitution, Oklahoma has weighted the right with the responsibility for an abuse of that right [freedom of speech]."

94. *Kennedy*, 935 So. 2d at 680–81.

95. The language of the Louisiana Constitution, in contrast to the United States Constitution, expresses concern for the abuse of freedom of speech. This express concern is an important factor to consider when balancing the rights of the private individual and free speech concerns.

96. *Kennedy*, 935 So. 2d at 680.

improper motive."[97] Because the court endorsed a negligence standard for private plaintiffs in matters of *private* concern, it reasoned that applying the same standard for matters of *public* concern would simplify defamation law.[98] This particular decision by the court exemplifies the more "plaintiff friendly" approach taken by the judiciary, which could stem from concern about the new areas of defamation emerging through the Internet.[99]

Finally, the court noted that adoption of a negligence standard promotes consistency in defamation law because the vast majority of states considering the issue in the wake of *Gertz* have adopted the negligence standard.[100] According to Elder, approximately forty-four states[101] have adopted or approved the negligence standard, while only three have chosen the more stringent actual malice standard.[102] Accordingly, the court adopted the Restatement version of the negligence standard; meaning that a person could be held liable for defamation in Louisiana if he publishes a false and defamatory statement that causes injury and he either (1) knows the statement is false, (2) acts in reckless disregard of the truth, or (3) *acts negligently in failing to ascertain the circumstances*.[103]

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97. *Id.* (quoting Costello v. Hardy, 864 So. 2d 129, 143 (La. 2004)).

98. *Id.*

99. When gauging how "plaintiff friendly" this aspect of the decision is, it is helpful to note again that the U.S. Supreme Court at one point ruled that *any matter of public concern* should be governed by the actual malice standard. Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). The evolution to the less stringent negligence standard will create a marked difference in a plaintiff's ability to prove a prima facie defamation claim.

100. *Kennedy*, 935 So. 2d at 681–82. For discussion of the states' responses to *Gertz* and the choices between negligence, gross negligence, or actual malice standards, see ELDER, *supra* note 47, § 6.2, at 4–18.

101. The District of Columbia has also adopted the negligence standard. ELDER, *supra* note 47, § 6.2, at 10.

102. *See id.*

103. *Kennedy*, 935 So. 2d at 680–81 (quoting RESTATEMENT (SECOND) OF TORTS § 580B (1977)). This assumes that the publication to a third party is not subject to an absolute or qualified privilege. Schaffner has discussed factors that should be considered in a defamation negligence analysis:

> To cast this test in a slightly different light, the balancing is a matter of weighing the probability and gravity of the risk, in light of the social value of the interest threatened, against the value of the defendant's

C. *Affirming a Stronger Qualified Privilege: Remnants of the* New York Times *Standard*

1. *Historical Basis for Qualified Privilege*

Common law privileges were developed as a remedy to the harsh strict liability system to exempt certain speech from civil liability.[104] The "public interest" privilege is one of the many privileges invoked by defendants that have been recognized by Louisiana jurisprudence.[105] One underlying purpose of the "public interest" privilege is to allow possible criminal activity to be reported to the proper authorities without fear of liability. The Louisiana Supreme Court has stated that the public interest privilege is "vital to our system of justice . . . that there be the ability to communicate to police officers the alleged wrongful acts of others without fear of civil action for honest mistakes."[106]

The *Kennedy* court faced a question, after finding that the "public interest" privilege clearly applied, which shifted the burden

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> activity to society and the defendant and the cost of alternatives. . . . [T]he factors on the plaintiff's side of the scale are the following: (1) the value to society of reputation, (2) the risk of injury to plaintiff's reputation, and (3) the gravity of the injury to plaintiff's reputation. The factors on the defendant's side include the following: (1) the value to society of information dissemination and (2) the cost of increased fact verification necessary to avoid injury, in terms of both time and money to defendant.

Schaffner, *supra* note 40, at 476.

104. Trentecosta v. Beck, 703 So. 2d 552, 563 (La. 1997). *See generally supra* Part II.A. The existence of a privilege is based on the good faith of the communicator, whether he or she has an interest or duty with regard to the communication, and if it is published to a person with a corresponding interest or duty.

105. *See* Simon v. Variety Wholesalers, Inc., 788 So. 2d 544 (La. App. 1st Cir. 2001) (ruling that a convenience store employee enjoyed a qualified privilege in reporting suspected shoplifters to authorities and dismissing the defamation action on a summary judgment motion). The Restatement says that a statement will be privileged if circumstances cause one to reasonably believe that "(a) there is information that affects a sufficiently important public interest, and (b) the public interest requires the communication of the defamatory matter to a [proper] public officer . . . ." RESTATEMENT (SECOND) OF TORTS § 598 (1977).

106. *Kennedy*, 935 So. 2d at 683.

of proof back to the plaintiff:[107] What standard of proof is necessary to prove *abuse* of a qualified privilege? Historically, a privilege was defeated by malice in fact, i.e., actual motives of personal spite or ill will.[108] In recent years, Louisiana courts have held that a qualified privilege is abused if a statement is not made in good faith, or in other words, without "reasonable grounds for believing the statement to be true."[109] In 1994, the Louisiana Supreme Court determined that the two standards are synonymous in the defamation context, and the "reasonable grounds" standard was adopted for abuse of a privilege.[110]

2. Trentecosta *and the Knowing Falsity/Reckless Disregard Standard*

The court had to reconsider its position on the abuse standard only a few years later because the continuing viability of common law privileges was called into question.[111] The inherent conflict between the constitutional fault required in most if not all cases (negligence or greater) and the traditional grounds to prove abuse of a privilege (essentially negligence as to the truth) means that a plaintiff who makes a prima facie case of defamation *also* proves abuse of any privilege that could be asserted.[112] In *Trentecosta v. Beck*, the court chose the Restatement's approach to abuse of qualified privileges after recognizing the conflict and seeking to preserve the traditional system of privileges.[113] The *Trentecosta* decision resulted in the adoption of a more stringent standard that

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107. Regarding the burden shift, the court explained, "[T]he practical effect of the assertion of the conditional or qualified privilege is to rebut the plaintiff's (Kennedy's) allegations of malice (or fault, which in this case amounts to negligence) and to place the burden of proof on the plaintiff to establish abuse of the privilege." *Id.* at 683 (citing Smith v. Our Lady of the Lake Hospital, Inc., 639 So. 2d 730, 746 (La. 1994)).

108. *Id.* at 683 (citing Berot v. Porte, 81 So. 323 (La. 1919)).

109. *Id.*

110. *Id.* at 684.

111. *Id.*

112. *Id.* (citing Trentecosta v. Beck, 703 So. 2d 552, 563 (La. 1997)).

113. *Trentecosta*, 703 So. 2d at 564.

requires a plaintiff to prove "knowledge of falsity or reckless disregard" by the defendant for abuse of a privilege.[114]

Picking up where the *Trentecosta* decision left off, the court examined the adoption of the higher standard at length. First, the court characterized the higher "knowing falsity/reckless disregard" standard as an approach that "acknowledges the changes" in defamation law, especially the entry of First Amendment concerns.[115] Further, the court stressed the important role that privileges play in balancing the interests of the individual with those of third persons or the public: "Adopting the actual malice standard . . . allows courts to continue to balance these competing interests . . . [and] retain the hierarchy of specially protected types of speech that we have traditionally recognized."[116] Additionally, the court recognized the growing number of jurisdictions adopting the higher standard and stated that its decision supports the goal of creating more consistency between constitutional and state law with respect to defamation.[117]

Finally, the court pointed out that the higher standard promotes the essential public policy of encouraging citizens to report suspicious activity to the police.[118] Without the higher standard, the fear of civil liability would deter citizens from reporting activity—something the court says is unfair to the people reporting suspected criminal activity in good faith, as well as to the community at large.[119]

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114. *Id.* It merits mention that *Trentecosta* concerned a different privilege (reporting government proceedings and activities) than the privilege asserted in *Kennedy* (public interest). *See also* RESTATEMENT, Special Note, *supra* note 56.

115. *Kennedy*, 935 So. 2d at 684–85.

116. *Id.* at 685. The "specially protected type of speech" to which the court refers is one that involves a matter of *public concern.*

117. *Id.* The shift to the knowing falsity/reckless disregard standard has been in large part because of the influence of the Restatement's position, but it is also a departure from longstanding common law. According to Elder, "The innovation contained in the oft-cited Restatement (Second) of Torts § 600 provision is its radical preemption of the majority view at common law, i.e., the 'traditional view' that privilege is forfeited where plaintiff proves publication by defendant without probable cause or reasonable grounds for belief in truth." ELDER, *supra* note 47, § 2.3, at 136.

118. *Kennedy*, 935 So. 2d at 685.

119. *Id.* at 685–86.

3. A Hollow Victory for Defamation Plaintiffs?

Despite the adoption of the "knowing falsity/reckless disregard" standard by Louisiana and other jurisdictions, the higher standard is not without legitimate criticism. Although scholars cite various reasons for advocating alternatives, most critics of the Restatement approach agree that it incorrectly assumes that the *Gertz* constitutional requirements apply to all defamation claims.[120] As David A. Elder explained while discussing the impact of the later *Dun & Bradstreet* ruling, "In other words, the constitutionally based substrata for the § 600 rule—that reckless disregard of falsity is likely necessary since negligence is probably required in *all* cases of defamation—has been rejected."[121]

Elder's criticism of the Restatement's approach is not limited to its incorrect predictions about future trends in defamation. He also contends that the heightened standard ignores the state's interest in protecting private individuals' reputations, as evidenced by many states' constitutional provisions.[122] Elder further exposes problems with a higher abuse standard by pointing out that, under the Restatement's approach, proof of fault that is sufficient to win damages in a private plaintiff/public concern case (negligence) is "legally insufficient as a matter of law to overcome a privilege in the purely private setting that encompasses most of the arena of common law privilege."[123]

In matters of purely private concern, Elder's argument points out the inconsistency of states that on one hand claim to have an interest in protecting the private individual's reputation, but on the other, apply the knowing falsity/reckless disregard standard even

120. ELDER, *supra* note 47, § 2.3, at 137.

121. *Id.* (emphasis added).

122. *Id.* at 138. Elder forcefully states, "This ill-considered, poorly reasoned perspective runs afoul of the spirit of the decisions interpreting state constitutional provisions as evidencing a preference for, if not mandating, a post-*Gertz* rule intruding least severely on the fundamental interest in reputation." *Id.*

123. *Id.* Because truth and privilege are the only two defenses for defamation actions, it is likely that much of defamation law will be subject to the knowing falsity/reckless disregard standard—a huge burden on plaintiffs that may not be warranted in cases of purely private concern where the privilege invoked has nothing to do with public interests.

when First Amendment concerns are minimal.[124] Should a business partner who writes a libelous letter relating to a partnership's lawsuit to recover money be able to invoke the "common interest" privilege as a defense?[125] While the circumstances could justify *some* type of privilege in a defamation action, purely private matters do not raise constitutional concerns and do *not* justify a privilege that is nearly insurmountable.[126]

While Elder's concern is primarily with the inequities private plaintiffs face in matters of private concern, other scholars criticize the higher abuse standard on a more systemic level. One such scholar, Richard L. Barnes, contends that the system of common law privileges is outdated and should probably be subsumed within a uniform negligence standard.[127] Barnes argues that the purposes of the extensive privileges of common law—to alleviate the harshness of strict liability and balance the interests of the individual with those of third parties or the public—have been replaced by the fault system in *Gertz*.[128] Barnes' contention directly challenges the court's statement in Kennedy that the adoption of a higher abuse standard "acknowledges the changes" in defamation law. Barnes instead suggests that the shift to a fault system under *Gertz* has completely supplanted the need for privileges.[129]

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124. *Id.* Elder also argues that the "uniformity of law" justification does not warrant a higher standard in all cases just because of the fact that a private plaintiff's claim for defamation has been made more difficult in cases in which his interests have been outweighed by important constitutional values: "[I]t does not follow . . . that his recovery should be made more difficult in situations in which no such constitutional values are involved merely for the sake of securing symmetry of treatment of defendants." *Id.* at 139 (citing Harley-Davidson Motorsports, Inc. v. Markley, 568 P.2d 1359, 1365 (1977)).

125. A "common interest" privilege traditionally exists when any one of several people with a common interest in the subject matter reasonably believes that there is information that the others are entitled to know, such as business partners. *Id.*

126. This circumstance exemplifies the need for flexibility in determining what constitutes an abuse of a privilege depending on the circumstances.

127. *See* Barnes, *supra* note 28, at 822.

128. *Id.* at 822–23.

129. *Id.* at 822–23. Barnes writes, "The requirement of fault is similar to the common law privileges in that it attempts to protect valuable communications

Barnes writes: "*Gertz* may simply be a more modern expression of the same concerns that motivated the creation of the common law privilege using a fault test rather than malice."[130] He concludes that a uniform negligence system is superior to the common law privileges for two reasons: (1) it gives uniformity to tort law by putting defamation under the umbrella of the negligence analysis,[131] and (2) the new standard of fault (negligence) serves a similar function and can be seen as a "vast privilege," which would eliminate the need for narrower application.[132]

4. A Manageable Compromise—Exercising Judicial Restraint

Although criticisms of the "knowing falsity/reckless disregard" abuse of privilege standard are legitimate in some circumstances, there are valuable considerations that justify its adoption in some cases. The adoption of a pure negligence system to determine abuse of a qualified privilege is too radical of a departure from previous defamation case law. The abuse standard would then likely become a jury issue and would be decided on each juror's individual concept of "reasonableness."[133] As one scholar has suggested, because the result is often a "popularity contest" between the plaintiff and defendant, qualified privileges and the protections they are designed to provide suddenly become "tenuous, unpredictable, and inadequate."[134]

The continued vitality of qualified privileges is also necessary in the wake of the *Dun & Bradstreet* and *Costello* rulings. Both cases suggest that a suit brought by a private plaintiff against a

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while recognizing the individual's interest in being free of defamation." *Id.* at 804.

130. *Id.*

131. *Id.* at 819. According to Barnes, "Extension of this negligence standard [for abuse of privilege] would make uniform a large area of the law of defamation without a radical departure from the traditional notion that certain communications deserve protection." *Id.*

132. *Id.* It should be noted, contrary to the prediction in Barnes' article, strict liability probably has not been completely eliminated in Louisiana to date.

133. SACK, *supra* note 37, at 9–44.

134. *Id.*

non-media defendant in a matter of private concern may still be ruled by strict liability.[135] To deprive a defendant of the privilege while also allowing a plaintiff to benefit from presumed fault, damages, and injury is patently unjust.[136] Further, as the court pointed out, a failure to preserve privileges ignores their value in balancing the rights of the individual's reputation with those of third parties or the public.

Finally, the court's adoption of the higher abuse standard in matters of *public* concern is an effective way to protect certain types of speech and encourage public policies that serve the interests of the community. Because the state wants to encourage the reporting of possible criminal activity, "[i]ndividuals who engage in behavior beneficial to society should not be penalized by facing exposure to civil liability for mistakes in judgment attributable to simple negligence."[137]

The interests of the public are at stake in a matter of public concern, and this factor makes the alleged defamer's contribution more worthy of protection than in a matter of private concern.[138] The court's holding is likely broader than it should be because Elder's arguments warrant the use of a traditional "reasonable basis" abuse standard in matters of private concern.[139] That being

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135. *See supra* Part II.A.

136. This scenario would be similar to the early strict liability era that necessitated privileges in the first place and invited litigious plaintiffs to sue—a consequence that could lead to self-censorship of valuable speech.

137. Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669, 685–86 (La. 2006).

138. The difference in the competing interests in matters of public versus private concern is exactly the point made by Elder in his criticism. *See supra* Part III.C.3.

139. The appellate court decision, written by Judge Jefferson Hughes, suggests that the defendant may not have had a "reasonable basis" to report the suspected counterfeit bill to police after only observing it; the employees had no formal training and did not have a "counterfeit pen" present. *Kennedy*, 899 So. 2d at 689. Further, his opinion suggests that the actions of the employee could be considered "reckless," which would result in the abuse of a privilege. *Id.* at 688–89. However, the appellate opinion fails to focus on the heightened protection given to speech in matters of public concern. A failure to investigate currency with a counterfeit pen is not enough to show "reckless disregard," especially given the corroborating evidence by the deputies about the suspicious appearance of the bill. Finally, and perhaps most importantly, the appellate decision misapplied the

said, there are undoubtedly valid justifications for the adoption of the higher standard in matters of public concern.

As an alternative to utilizing the private/public concern distinction concerning abuse of privilege, Louisiana courts have the option to examine qualified privileges on a case-by-case basis under the higher standard. If this method is chosen, however, the courts should heed the warnings of the Restatement drafters concerning the extension of qualified privileges:

> One important effect of this is that courts will be more cautious in holding that a conditional privilege exists. Under circumstances when the court feels that a defendant should be held liable for defamation if he is merely negligent, as distinguished from being reckless, then it should hold that a conditional privilege does not exist in that particular situation.[140]

Because the *Kennedy* court adopted the more stringent Restatement approach regarding abuse of qualified privileges, lower courts would be wise to use them sparingly to relieve a private plaintiff of a weighty burden that is reminiscent of the *New York Times* standard first handed down over forty years ago.

IV. CONCLUSION

The *Kennedy* decision is a valuable case to Louisiana practitioners largely because it provides a comprehensive overview of defamation in Louisiana and attempts to answer some complicated, unresolved questions of law. In many respects, the court's decision properly reflects recent trends in defamation law across the country. The major decisions discussed in the analysis are generally well supported by the state constitution, federal and state jurisprudence, and competing public policies.

Extending constitutional protections to non-media defendants, while perhaps unintentionally penned in too broad of a fashion, is a

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burden-shifting approach to qualified privileges. Once the defendant established that the report was privileged, the *plaintiff* had the burden to prove abuse of that privilege.

140. *See* RESTATEMENT, Special Note, *supra* note 56.

sensible choice with regard to matters of public concern. To extend the constitutional requirements to matters of private concern, however, would seemingly eliminate all strict liability and overrule the court's recent holding in *Costello*.

The adoption of a uniform negligence standard for all private plaintiffs is a proper reflection of the trend in defamation law toward states emphasizing uniformity. Further, with the ubiquity of the Internet and other emerging privacy-related issues, the court's decision properly protects the reputations of individuals by adopting a lower standard.

Finally, the court's affirmation of a higher abuse standard to defeat a qualified privilege is justified in limited circumstances. Rather than writing defamation defendants a blank check, this author would advise restricting it to matters of public concern or exercising judicial restraint in finding the existence of the more powerful qualified privilege.

Ultimately, the decision represents Louisiana's cautious and calculated move toward a more uniform negligence standard that is clearly beneficial to private plaintiffs when compared to the *New York Times* actual malice standard. Before celebrating a victory, however, defamation plaintiffs would be wise to tread carefully around a stronger qualified privilege that represents the looming shadow *New York Times* still casts over Louisiana defamation law.

Louis Edward Layrisson, III[*]

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V. APPENDIX

(1) A **"public plaintiff"** is a person who is either designated as a public *official* or as a public *figure.* A public official is one "whose governmental position has such apparent importance that the public has a special interest in the qualifications and performance of the person who holds it."[141] A public figure is one who, whether through notoriety or through achievement, successfully captures the public's attention for one or more issues.[142] A person can be a public figure for one issue but not others, and one may also be an involuntary public figure in some circumtances.[143]

A. Public Plaintiffs

PLAINTIFF	DEFENDANT	MATTER/ CONCERN	STANDARD OF LIABILITY
Public	Media	Public	The *New York Times* actual malice standard would apply, meaning that the plaintiff must prove "knowing falsity or reckless disregard" on the part of the defendant.[144]
Public	Non-Media	Private	Louisiana courts have applied the actual malice standard here as well.[145] It can be safely assumed the same standard would apply in matters of public concern.

141. MARAIST & GALLIGAN, *supra* note 4, § 19.02. *See also* Rosenblatt v. Baer, 383 U.S. 75 (1966); Fitzgerald v. Tucker, 715 So. 2d 1281 (La. App. 3d Cir. 1998), *rev'd on other grounds*, 737 So. 2d 706 (La. 1999) (discussing whether a government employee could be considered a "public official"). The designation of a plaintiff as a "public figure" is a question for the court. Guzzardo v. Adams, 411 So. 2d 1148 (La. App. 1st Cir. 1982).

142. MARAIST & GALLIGAN, *supra* note 4, § 19.02. *See also* Curtis Pub'g Co. v. Butts, 388 U.S. 130 (1967).

143. MARAIST & GALLIGAN, *supra* note 4, § 19.02. For example, a person who does not seek public attention could still be considered a public figure if his or her conduct was the subject of substantial media coverage or prominently featured in tabloid reports.

144. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964). Although it is possible that a public plaintiff could sue a media defendant in a matter of purely private concern, it would be a rare occurrence.

145. Wattingny v. Lambert, 453 So. 2d 1272 (La. App. 3d Cir. 1984).

(2) A **"private plaintiff"** is any other private citizen who is not designated a public official or public figure.

The following tables summarize different scenarios classified by plaintiff:

B. Private Plaintiffs[146]

PLAINTIFF	DEFENDANT	MATTER/ CONCERN	STANDARD OF LIABILITY
Private	Media	Public	Negligence
Private	Media	Private	Although previous cases have applied the actual malice standard,[147] the *Kennedy* decision adopts the negligence standard for all private plaintiffs.
Private	Non-Media	Public	Negligence[148]
Private	Non-Media	Private	Although there are minimal constitutional concerns,[149] the *Kennedy* decision leaves some uncertainty as to whether any possibility for strict liability remains. When words are not *defamatory per se*, it is likely that the negligence standard will apply.[150] However, when words are *defamatory per se*, it is possible that either the negligence standard or a strict liability standard could apply.[151]

146. It is important to note that when a privilege is successfully invoked against a private plaintiff, the standard of liability will be the "knowing falsity/reckless disregard" standard regardless of the original burden on the plaintiff—meaning that any negligence analysis would then be subsumed within the higher actual malice standard.

147. *See* Hebert v. La. Assoc. of Rehabilitation Profs., 653 So. 2d 757 (La. App. 3d Cir. 1995).

148. This row represents the factual circumstances of the *Kennedy* decision.

149. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749 (1985).

150. *See* Kennedy v. Sheriff of E. Baton Rouge, 935 So. 2d 669, 675 (La. 2006); Costello v. Hardy, 864 So. 2d 129 (La. 2004).

151. *See Kennedy*, 935 So. 2d at 675; *Costello*, 864 So. 2d 129.